

State Water Resources Control Board

presents:

STORMS Seminar Series: Municipal Finance of Stormwater Projects



Strategy to Optimize Resource Management of Stormwater (STORMS)

Mission

To lead the evolution of stormwater management in California by **advancing the perspective that stormwater is a valuable resource**, supporting policies for collaborative watershed-level stormwater management and pollution prevention, removing obstacles to funding, developing resources, and integrating regulatory and non-regulatory interests.





Stormwater Management: How to Pay for It?

SWRCB Seminar

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Disclaimer

- The contents of this presentation do not necessarily reflect the views and policies of the State Water Resources Control Board, nor does mention of trade names or commercial products constitute endorsement or recommendation for use.

Stormwater Services, In General

- Cities and Counties have Constitutional Authority to serve their constituents. (Cal. Const., art. XI, § 7)
- They can own property, including roads and streets and associated drainage facilities. (E.g., Gov. Code, § 37354; Prob. Code § 6102 [acquisition by gift, bequest, devise].)
- Management of that property is subject to state and federal environmental laws, including the National Pollutant Discharge Elimination System (NPDES) of the federal Clean Water Act.
- This has lead to very expensive mandates with respect to the MS4 – the Municipal Separate Stormwater Sewer System – which local governments find difficult to fund and have therefore challenged in court.

HJTA v. Salinas

98 Cal.App.4th 1351 (2002)

- City imposed a fee on the property tax roll measured by impervious coverage to cover the cost to comply with NPDES mandates.
- Fee could be avoided by retaining stormwater on site so that off-site flows match those in pre-development condition.
- 6th District ruled this was a tax requiring voter approval and not a “sewer” fee partly exempt from Prop. 218.

Property Related Fees & Taxes

- Since *Salinas*, some cities have persuaded property owners to vote for property-related fees to fund water quality and flood control services.
- E.g., *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277 [election under art. XIII D, section 6(c) not subject to art. II requirements for registered voter elections].)
- Others have adopted special taxes with 2/3 voter approval.
- Fees and taxes have been more successful in affluent coastal communities than elsewhere.

Utility Fees?

- Prop. 218 defines the “water” services which may be funded from a fee partly exempt from Prop. 218 broadly.
 - *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 598–599
 - Gov. Code, § 53750(m): “‘Water’ means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source.”
- Prop. 218 Omnibus Act does not define “sewer” or storm sewer but does define “drainage system,” “flood control” for purposes of assessments and property related fees requiring voter approval

Types of Fees

- Prop. 26 defines everything as a tax, except:
 - Fees for benefit or privilege (e.g., utility connection)
 - Fees for service or product (e.g., utility services)
 - Regulatory fees
 - Use of government property
 - Fines and penalties

More Types of Fees

- Prop. 26 Exceptions for Local Governments Only
 - Development Fees (permitting, CEQA mitigation, development impact fees)
 - Assessments and property related fees subject to Prop. 218

Authority for Fees

- Every fee must be authorized by some legislation, such as:
 - the Constitution (utility fees)
 - Statutes (e.g., Water Code, SGMA legislation, etc.)
 - Local ordinances (e.g., utility fees, permit fees)

Prop. 218 in a Nutshell

- Prepare justification for fee (13D, 6(b))
- Give notice of majority protest hearing by mail (13D, 6(a)(1))
- Conduct majority protest hearing (13D, 6(a)(2))
- If no majority protest, impose fee (13D, 6(a)(2))
- If not for water, sewer or trash, conduct registered voter election or property owner election on fee (13D, 6(c))
- Can set fees with annual CPI adjustment for up to five years (GC 53756)

Prop. 26 in a Nutshell

- No procedural requirements
- Must qualify for one of 7 exceptions
- Exception for regulatory fees
 - Limited to reasonable costs of regulation
 - Costs allocated in “fair or reasonable relationship to payor’s burdens on, or benefits ... from” government regulation
(Cal. Const., art. XIII A, subd. (b)(3); art. XIII C, §1(e)(3).)

Tips on Rate-making

- Use a rate-making consultant
- Have the cost-of-service analysis (COSA) reviewed by an attorney
- Allow for the possibility Board will reject consultants' recommendation
- Make a good record
- Don't adopt fees not supported by the record
- Consider validation

Stormwater Recapture

- AB 2403 (Rendon, D-So. Gate)
 - Codifies *Griffith v. Pajaro*
 - Amended GC 53750(m) to add “from any source” to definition of “water” in Prop. 218 Omnibus Implementation Act
 - Chaptered 6/28/14

SB 231 & Storm Sewer Funding

- Would amend Prop. 218 Omnibus Act to define the “sewer” fees which do not require voter approval to include: “drains, conduits, outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters.”
- As of 4/6/17, pending third reading in the Senate
- Supported by municipal and environmental groups; opposed by some cities and the HJTA

Crawley v. Alameda County Waste Management Authority

243 Cal.Ap.4th 396 (2015)

- JPA operating County MRFs and transfer stations for County and cities provided household hazardous waste management services at those sites funded by a fee on the property tax roll.
- Resident sued, arguing the fee was not for a property related service, but was a tax, because no service was directly provided to the properties, but at MRFs and transfer station.
- Court upheld fee, defining “refuse removal” services partially exempt from Prop. 218 using a Health & Safety Code definition of “refuse.”

SB 231 is akin to *Crawley*

- It defines “sewer services,” drawing on an existing statutory definition.
- It does so broadly to include sanitary and storm sewers.
- It disagrees with *Salinas* and will require a published appellate decision to prevail.
- Query whether local governments will be willing to accept the litigation risk.

Pending Finance Cases

- *Jacks v. Santa Barbara*, S225589 (argued 4/4/17) — Is charter-city franchise fee on SCE a tax under Prop. 218? Is the legal character of a measure depending on its legal or its economic incidence?
- *City of Ventura v. United Water Conservation District* (to be argued soon) — Is groundwater fee required by statute to have 3:1 ratio of ag to M&I charges constitutional?
- *Citizens for Fair REU Rates v. Redding*, S224779 (fully briefed 7/21/15) – does Prop. 26 grandfather PILOT from electric utility?

More Pending Finance Cases

- *CBIA v. SWRCB*, S226753 (fully briefed 12/20/15) — *Sinclair Paint* challenge to SWRCB fees for water quality programs; DCA found it sufficient that fee did not exceed cost of 8 related regulatory programs; each program need not be self-funded

Recent Cases Likely to See PFRs

- *Cal. Chamber of Commerce v. State Air Resources Bd.* (2017) ____ Cal.App.5th ____ (3rd DCA C075930) — AB 32 auction fees not taxes because voluntarily paid for something of value; *Sinclair Paint* does not apply.
- *Manteca USD v. Reclamation District 17* (2017) ____ Cal.App.5th ____ (3rd DCA C077906) — Prop. 218 overcomes inter-govt. tax immunity for purposes of assessments

Conclusion

- Absent voter support for tax or property related fee, the best means to fund NPDES mandates and other stormwater recapture may be an array of sources
 - Water & sewer fees
 - Trash fees?
 - Development Impact Fees
 - Command & Control regulation with in lieu fee
 - Constitutional amendment?

Questions?

Webcast attendees, please email questions to:

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